No. 3895

United States

Circuit Court of Appeals

For the Ninth Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

W. C. CAVITT, Esq., Russ Building, San Francisco, Calif.,

Attorney for Plaintiffs.

H. B. M. MILLER, Esq., 201 Sansome St., San Francisco, Calif.

Attorney for Defendant, Kate I. d'Aleria.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

CHARLES SHIREY and JENNIE SHIREY, Husband and Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Sometimes Known as MRS. GEORGE NIXON,

Defendants.

(Amended Complaint).

Now comes the plaintiffs and files this their amended complaint, by leave of the Court first had and obtained, complains of defendants and alleges:

I.

That at all the times herein mentioned said plaintiffs were, have been continuously and now are husband and wife living and residing together in said city and county of San Francisco.

II.

That at all the times herein mentioned said de-

fendants were in charge of, owned, operated, and had control of that certain automobile commonly known and designated as a Locomobile automobile, and designated by license number 30449, State of Nevada.

III.

That at all the times herein mentioned the said city and county of San Francisco is now and was during all of said time herein mentioned a municipal corporation, duly formed, organized and existing under the constitution and laws of the State of California, and as such municipal corporation said city and county of San Francisco has laid out as a public thoroughfare and dedicated to public use, large numbers of streets, street crossings, courts, [1*] alleys and lanes, in said city and county, among which are streets known and designated as Golden Gate Avenue and Gough Street in said city and county of San Francisco, California, and said Golden Gate Avenue and said Gough Street and the crossings of said last-named streets, is now and were at all of the times herein mentioned in said amended complaint an open, public thoroughfare and dedicated to public use.

IV.

On Sunday morning the 20th day of April, 1919, on or about the hour of 12:30 M. in the night-time, that is to say, between the hour of 12 o'clock and one o'clock at night between Saturday night and Sunday morning, said plaintiffs were riding in a seven-passenger Studebaker automobile, which said

*Page-number appearing at foot of original certified Transcript of Record.

Studebaker automobile, was at all times herein mentioned being driven, was in charge of, owned and operated by one of said plaintiffs, to wit, Charles Shirey, at said time at a slow moderate rate of speed of nine miles per hour, and said Studebaker automobile so operated as aforesaid, was preceding at said time in a northerly direction and near the curb on the easterly side of Gough Street toward Turk Street, and along and over and close to the easterly side of the crossing of Gough Street and Golden Gate Avenue toward Turk Street, at a speed of nine miles per hour at said time and place, in said city and county aforesaid.

V.

On said last-mentioned date, and at the time and place aforementioned, and while said plaintiffs were crossing the crossing of said Gough Street and said Golden Gate Avenue on the easterly side thereof toward Turk Street in a northerly direction as aforesaid, in said city and county of San Francisco, and at the time and place in question said defendants, owned, operated, had control of and were in charge of, and were then and there at the time and place in question, carelessly and negligently operating, [2] driving, had charge of and were in control of that certain passenger automobile known and designated as a Locomobile, at a high and dangerous rate of speed, along, upon and over the crossing of said Gough Street and said Golden Gate Avenue, and were at said time and place proceeding in an easterly direction on said crossing at same time toward Franklin Street, and over the north-

erly side of said crossing of said street and avenue aforesaid in said city and county of San Francisco, California, at same time at a high and dangerous rate of speed, to wit, at a rate of speed in excess of 35 miles per hour, and without giving any notice, signal or warning to plaintiff of the approach of said Locomobile automobile so operated by said defendants as aforesaid.

VI.

That while said plaintiffs were so riding in said Studebaker automobile as aforesaid, and at the time and place in question, and at and past the center of Golden Gate Avenue on said crossing of said Gough Street and Golden Gate Avenue as aforesaid, and approximately within about ten feet from the northerly line of Golden Gate Avenue on the easterly side of said crossing of said street and avenue as aforesaid, and while said plaintiffs were at said time and place in said Studebaker automobile as aforesaid, and were proceeding in a northerly direction and close to the intersection of the curb-line of the curb on the easterly side of said crossing of said Gough Street and said Golden Gate Avenue toward Turk Street, and at the time and place aforesaid, said defendants, at said time and place then and there so carelessly and negligently operated and drove said Locomobile at such a high and dangerous rate of speed as aforesaid, and said Locomobile automobile then and there being operated by said defendants carelessly and negligently at said time and place, without any fault on the part of said plaintiffs, collided with great force and violence with said Studebaker

automobile in which said plaintiffs were then and there at the time and [3] place in qestion riding in said Studebaker automobile, and at said time and place knocked and threw said plaintiffs out of said Studebaker automobile with great force and violence, and said plaintiffs then and there at the time and place in question struck the hard asphalt street on a concrete base on said crossing of said Gough Street and said Golden Gate Avenue at the time in question with great force and violence, inflicting upon said plaintiff Jennie Shirey the following injuries, to wit:

Severe lacerations on left side of head, contusions and abrasions of left side of face; left axillary space badly discolored, bruised and injured; ecchymosed over left breast; left ilium injured severely; deep multiple contusions of lower left leg; comminuted fracture of left fibula; and of the lower third of said fibula; transverse fracture of left tibia lower third; deep multiple laceration of right leg; deep laceration reaching to the bone of middle third right tibia; severe injury to the left breast; left eye badly discolored; her back is sore and wrenched; that said plaintiff Jennie Shirey struck the hard asphalt street on a concrete base with such great force and violence that she became and was at said time unconscious for more than one hour, and she suffered great, severe and excruciating pain in her head, left ankle, in both lower limbs, left breast, in her back and in her left eye, and she has sustained and suffered great severe physical pain, severe

mental anguish, and a very great severe nervous shock.

VII.

Plaintiff is informed and believes, and upon such information and belief alleges and states the facts to be, that she is now and was at said time permanently injured.

By reason of said injuries so received as aforesaid, plaintiff Jennie Shirey (wife of Charles Shirey) did suffer, and has suffered, and does now suffer, and will continue to suffer great severe physical pain, and great and severe mental anguish, [4] and at all of the times herein mentioned said plaintiff Jennie Shirey has suffered, did suffer, and is now suffering, and continues to suffer from a great and very severe nervous shock, caused by said injuries so received by her as aforesaid.

VIII.

That by reason of said injuries to Jennie Shirey (plaintiff) as aforesaid, it was necessary for plaintiff Charles Shirey to and he did employ a physician and surgeon to treat her said injuries so received as aforesaid, for which he has incurred a reasonable and necessary bill of Five Hundred Dollars ($500.-00); that by reason of said injuries as aforesaid it was necessary for said plaintiff Jennie Shirey to be confined to a hospital for the period of one week or thereabouts, in which she was furnished nurse hire, medicine and medical supplies, and plaintiff Charles Shirey thereby incurring a reasonable and necessary bill of Forty Dollars ($40.00), all to his

damage in the sum of Five Hundred and Forty Dollars ($540.000).

IV.

That before said accident said plaintiff Jennie Shirey was an able-bodied woman; sound in mind and body; made a part of her own clothes and made nearly all of the clothes for the children of herself and husband and living with plaintiffs at the time in question, and when she had anyone employed to assist her in the housework she overlooked the same, and before the accident she did all the housework; and, in fact, was in charge and control of the household, and performed the usual duties that a housewife performs in that behalf; but that since said accident said plaintiff Jennie Shirey has been unable to perform and will never be able to perform, the said duties as aforesaid, to the plaintiff Charles Shirey's damage in the sum of Ten Thousand Dollars ($10,000).

X.

That by reason of said accident as aforesaid, the said Studebaker automobile owned by said plaintiffs at said time and at the time in question, was broken and completely wrecked, and [5] broken as follows, to wit: Front axle is broken; frame of said automobile is broken and twisted; the whole body is broken and twisted out of shape; springs broken and twisted; one door broken and torn off; top and all bows are broken; the whole top is entirely destroyed; the radiator is broken and twisted out of shape; right front wheel is broken to pieces; the steering gear is broken and twisted; the steering

wheel is broken; two fenders on left side of machine are broken and torn off; running-board on left side is broken and destroyed; right fender is bent and twisted; the hood is bent and broken; the speedometer is broken; one of the tires is punctured and destroyed and damaged; and the engine of said automobile is badly broken and damaged, and the said Studebaker automobile of plaintiffs is completely wrecked and destroyed by reason of said accident as aforesaid and by being struck with such great force and violence by defendants' Locomobile which was operated by said defendants at the time in question, that by reason of said damage to said Studebaker automobile as aforesaid, said plaintiff Charles Shirey was compelled to employ mechanics to repair said automobile so damaged as aforesaid by said defendants, for which he has contracted and incurred an expense of Four Hundred Dollars ($400.00), which said sum is and was a necessary and reasonable expense to incur to repair the broken parts of said Studebaker automobile, and to repair said Studebaker automobile by reason of said accident as aforesaid; all to his damage in the sum of Four Hundred ($400.00) Dollars.

XI.

That by reason of said accident, said plaintiff Charles Shirey had one good pair of his trousers torn and completely destroyed of the necessary and reasonable value of Eight ($8.00) Dollars; his overcoat torn and destroyed, which was and is of the necessary and reasonable value of Twenty-five Dollars ($25.00); one dress completely destroyed be-

longing to his wife, Jennie Shirey, [6] which was of the necessary and reasonable value of Forty ($40.00) Dollars, and one derby hat completely destroyed belonging to plaintiff Charles Shirey, of the necessary and reasonable value of Five Dollars ($5.00); that the whole of said personal property as aforesaid was completely and wholly destroyed by said defendants at the time and place in question, and at the time and place aforesaid, all of which personal property as hereinbefore mentioned was owned and was the property of said plaintiffs, and by reason of said personal property being destroyed by said defendants as aforesaid, said plaintiff Charles Shirey was compelled to and did incur an expense, which was a reasonable and necessary bill of Seventy-three ($73.00) Dollars; all to his damage in the sum of Seventy-three ($73.00) Dollars.

XII.

Said municipal corporation, designated and known as the city and county of San Francisco, on the 25th day of March, 1912, by the Board of Supervisors of said city and county of San Francisco, duly passed an act or ordinance known and designated as the "Book of General Orders" of the Board of Supervisors, providing regulations for the government of the city and county of San Francisco, and designated "General Book of Orders as Ordinance No. 1857 (New Series)," and relative to use of streets and regulating moving travel and traffic along, upon and over streets and upon and over all street crossings for all vehicles of every kind, etc., and approved by the Mayor of the city and

county of San Francisco, on the 26th day of March, 1912, and as amended by Ordinance No. 3495 (New Series), which was approved by the Mayor of said city and county, and as amended ever since said time and at the time in question has been continuously and now is in full force and effect, which said ordinance is hereby referred to and made a part of this complaint as if fully set forth herein. That said defendants did not at said time and place, and at the time in question, did not comply with said act and said ordinance as [7] hereinbefore referred to in any manner, or in any respect, and said defendants at said time and place then and there had control of, operated, and were in charge of, and were at the time in question operating and driving said Locomobile automobile, and did then and there carelessly and negligently operate and drive said Locomobile automobile over and across the crossing of Gough Street and said Golden Gate Avenue in an easterly direction toward Franklin Street, and on the wrong side of said crossing of said Gough Street and said Golden Gate Avenue, to wit, on the northerly side of said crossing at a high and dangerous rate of speed, and at a rate of speed greatly in excess of rate of speed as provided in said ordinance as amended, and as provided in sections 1, 2, 3 and 37 of said amended ordinance, which rate of speed as provided in amended ordinance in section 37 thereof in transversing a crossing or intersection of ways at greater speed than fifteen miles per hour on said crossings in a business district or district that is closely built up, and the District at the crossing of

Gough Street and said Golden Gate Avenue is closely built up, and was closely built up at the time in question, and said defendants at the time and place and at the time in question, did drive and operate said automobile upon and over said crossing at said time and place at a rate of speed in excess of 35 miles per hour, contrary to and in violation of said amended ordinance as aforesaid, which said amended ordinance was at the time plaintiff Jennie Shirey received her injuries as aforesaid in full force and effect.

WHEREFORE, plaintiffs pray damages and judgment against the defendants for the sum of Forty-thousand Dollars ($40,000), and the plaintiff Charles Shirey prays judgment against said defendants for the sum of Eleven Thousand and Thirteen ($11,013) Dollars, costs of suit, and general relief.

W. C. CAVITT,
Attorney for Plaintiffs. [8]

State of California,
City and County of San Francisco,—ss.

Charles Shirey, being first duly sworn, says that he is one of the plaintiffs named in the within and foregoing complaint, that he has read the within and foregoing amended complaint, and knows the contents thereof, that the same is true of his own personal knowledge, except as to matters therein stated upon his information or belief and as to those matters he believes it to be true.

CHARLES SHIREY.

Subscribed and sworn to before me this 29th day of April, 1919.

[Seal] A. J. NAGLE.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 29, 1919. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.

[Endorsed]: No. 16252. In the Southern Division of the U. S. District Court, Northern District of California, Second Division. Charles Shirey et al. vs. Harold A. Adrian et al. Record on Removal. Filed May 29, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

(Title of Court and Cause.)

Answer of Defendant Kate Nixon to Plaintiffs' Amended Complaint.

Now comes the defendant Kate Nixon and, answering the amended complaint heretofore served and filed herein, admits, alleges and denies as follows, to wit:

I.

As to the paragraph in said amended complaint numbered I, this defendant admits all the allegations therein contained.

II.

As to the paragraph in said amended compailnt numbered II, this defendant denies that, at all or any of the times therein stated, or at any time or at

all, the defendants above named owned, or that said defendants or this defendant operated or controlled, the automobile in said paragraph referred to, or any automobile whatever.

III.

As to the paragraph in said amended complaint numbered III, this defendant admits all the allegations therein contained.

IV.

As to the paragraph in said amended complaint numbered IV, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, at the time or place in said paragraph referred to, or at any time or place whatever, or at all, the plaintiff Charles Shirey was driving the Studebaker automobile therein mentioned, or any automobile, at a slow or moderate rate of speed, or at any rate of speed, less than thirty-five miles per hour. [10]

V.

As to the paragraph in said amended complaint numbered V, this defendant denies that, at the time or place herein mentioned, or at any time or place whatever or at all, the defendants above-named owned, or that said defendants or this defendant operated or had control of, or were in charge of, or were then or there or at any time whatever or at all carelessly or negligently or otherwise or at all operating or driving, the automobile in said paragraph referred to, or any automobile whatever or at all, either at a high or

dangerous rate of speed or otherwise, along or upon any street or highway or elsewhere or in any direction whatever or at all, either as in said amended complaint alleged or otherwise.

VI.

As to the paragraph in said amended complaint numbered VI, this defendant denies that, at the time or place in said paragraph mentioned, or at any time or place whatever or at all, either under the circumstances in said paragraph stated or otherwise, while plaintiffs were proceeding as there alleged or otherwise, the defendants above named were, or this defendant was, carelessly or negligently, or otherwise or at all, driving or operating any automobile whatever, or that, without fault on the part of plaintiffs, or otherwise or at all, any automobile being driven or operated by these defendants or by this defendant collided with great or any force or violence, or at all, with any automobile in which plaintiffs were, or either of them was, riding; and this defendant denies that, by reason of any collision between any automobile in which the plaintiffs were, or either of them was, riding and any automobile in which these defendants were or this defendant was riding, the plaintiffs were, or either of them was, knocked or thrown out of any automobile in which they were, or either of them was, riding upon the street or elsewhere; and [11] this defendant denies that, by reason of any acts or omissions of any kind or character upon the part of the defendants herein, or of this

defendant, the plaintiff Jennie Shirey was injured as in paragraph VI of said amended complaint alleged, or otherwise or at all; and, on information and belief, this defendant denies that the plaintiff Jennie Shirey was at all injured as in said amended complaint alleged, or otherwise.

VII.

As to the paragraph in said amended complaint numbered VII, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, by reason of any injuries received by the plaintiff Jennie Shirey, either as in said amended complaint alleged or otherwise, she has suffered or does now suffer or will continue to suffer great or any physical pain or great or any mental or nervous or other shock.

VIII.

As to the paragraph in said amended complaint numbered VIII, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, by reason of any injuries received by the plaintiff Jennie Shirey, or alleged to have been received by her, either as in said amended complaint stated or otherwise, or by reason of any matter, fact or thing whatsoever, the plaintiff Charles Shirey has been compelled to employ, or has employed, a physician or surgeon or nurse,

or has been compelled to procure, or has procured, any medicine or medical supplies, either of the total value of the sum of $540.00 or of the value of any sum whatever, or at all.

IX.

As to the paragraph in said amended complaint numbered IX, this defendant has no knowledge, information or belief sufficient [12] to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, prior to the accident in the amended complaint referred to, the plaintiff Jennie Shirey was an able-bodied woman, or was sound in mind or body, or made her own clothes, or nearly all or any of the clothes of her children, or assisted in the housework, or overlooked the same, or had charge or control of the household, or performed the usual or any duties that a housewife performs; and, on the same ground, this defendant denies that, since said accident, the plaintiff Jennie Shirey has been or now is unable to perform such or any work, or that she will never be able to perform such work or any work, either to the damage of the plaintiff Charles Shirey in the sum of $10,000.00 or to his damage in any sum whatever or at all.

X.

As to the paragraph in said amended complaint numbered X, this defendant has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that plain-

tiffs' automobile was injured or damaged, as in the said paragraph referred to, or otherwise or at all; and, on the same ground, this defendant denies that the plaintiff Charles Shirey was compelled to, or did, employ mechanics or anyone to repair said automobile at an expense of $400.00 or at any expense whatever or at all.

XI.

As to the paragraph in said amended complaint numbered XI, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that the clothes of the plaintiffs in said paragraph mentioned, or any clothes, or anything whatever of said plaintiffs, or of either of them, was damaged, as in said paragraph stated, or otherwise or at [13] all, on the same ground, denies that the necessary or any reasonable or other value of any of the things in said paragraph described was or is the sum of $73.00, or any sum whatever or at all.

XII.

As to the paragraph in said amended complaint numbered XII, this defendant denies that the defendants above named did not, or that this defendant did not, at the time and place in said paragraph mentioned, or at any time or place whatever or at all, comply with the ordinance in said paragraph referred to, or any ordinance whatever, and this defendant denies that these defend-

ants or this defendant carelessly or negligently, or otherwise or at all, operated or drove the automobile in said paragraph mentioned, or any automobile whatever, along or upon Gough Street or elsewhere on the wrong or any side thereof, at an excessive or any rate of speed.

And, for a SECOND and separate answer and defense to said amended complaint, this defendant alleges that she is informed and believes, and on such information and belief so states the fact to be, that the accident in said amended complaint referred to, and the injuries and damages therein mentioned, if any injuries or damages were caused, were caused solely and only by and through the carelessness and negligence of the plaintiff Charles Shirey, and not by or through any carelessness or negligence on the part of these defendants or of either of them, and that the carelessness and negligence of the said plaintiff Charles Shirey consisted in this:

1. That the said plaintiff Charles Shirey was driving his automobile in said amended complaint referred to at a high and excessive rate of speed, running in excess of thirty-five miles per hour in violation of the provisions of the ordinance referred to in paragraph XII in plaintiffs' amended complaint, and in violation of the general laws of the State of California, and in so doing [14] collided with an automobile being operated and driven by the defendant Adrian, in which said automobile this defendant was not riding, and of which

she, at the time of said accident, did not have any charge or control.

2. That, at the time of the accident in said amended complaint referred to, the automobile being driven by the defendant Adrian reached the intersection of Gough Street prior to the time the plaintiff Charles Shirey reached Golden Gate Avenue driving southerly along said Gough Street; and, instead of stopping his said Studebaker automobile and allowing the said Adrian to pass in front of it, he, the said Charles Shirey, carelessly and negligently endeavored to drive in front of the said Adrian; and that any accident which happened, and any injuries and damages which were caused or incurred by reason of the collision in said amended complaint referred to, was solely and only the result of the accident caused by the said plaintiff Charles Shirey as aforesaid.

For a THIRD and separate answer and defense to said amended complaint, this defendant alleges:

1. That, at the time of the accident in said amended complaint referred to, this defendant was not riding in, and did not have charge or control of, the Locomobile automobile in said amended complaint referred to, but the same was being used by the defendant Adrian for the purpose of taking a pleasure ride with a friend without the knowledge or consent of this defendant and in violation of instructions given to him by this defendant to take the said automobile to the garage where the same was kept by this defendant.

2. That the defendant, Adrian, at the time of said accident was not, and never had been, in the employ of this defendant as her chaffeur, and, on the evening that said accident happened, the Locomobile automobile in said amended complaint referred to was delivered to said Adrian by this [15] defendant solely and only for the purpose of having him take the same to the garage where it was kept by this defendant, and with specific instructions that he take the same there and leave it there.

3. That, at the time of the accident in said amended complaint referred to, said automobile of this defendant was not being taken by the defendant Adrian to the garage where it was kept by this defendant, but was being used by him solely and only for his own personal purpose, and not in connection with any business or affairs of any kind or character of this defendant, but in direct violation of specific instructions given to him by this defendant.

WHEREFORE this defendant prays that this action be dismissed as against her, and that she be granted her costs and disbursements herein.

MILLER, THORNTON, MILLER and WATT,
Attorneys for Defendant Kate Nixon..

State of California,
City and County of San Francisco.—ss.

Kate Nixon, being first duly sworn, deposes and says:

That she is one of the defendants named in the

foregoing answer; that she has read said answer and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated upon her information or belief, and that, as to those matters, she believes it to be true.

KATE I. NIXON.

Subscribed and sworn to before me this 19th day of August, 1919.

[Seal] JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California. [16]

Receipt of a copy of the within answer is hereby admitted this 20th day of August, 1919.

W. C. CAVITT,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 21, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

(Title of Court and Cause.)

Supplemental Complaint.

Now come the plaintiffs in the above-entitled action, and by leave of the Court first had and obtained, and by stipulation, files this their supplemental complaint herein, and alleges:

I.

That since the filing of the complaint herein the following facts in reference to the cause of action stated in said complaint and affecting said cause of action have arisen:

That the above-named defendants have since the commencement of the action have intermarried, and that the defendant sued herein as Harold A. Adrian is not his true and correct name, but plaintiffs allege that his true name is and was at the time of the commencement this action as follows, to wit: "Armand d'Aleria," sometimes known as Count d'Aleria.

II.

That Armand d'Aleria, sometimes known as Harold A. Adrian and Kate I. Nixon, one of the defendants herein, intermarried in the city of San Diego, county of San Diego, State of California, on the 26th day of January, 1920, and ever since said last-mentioned date have been and now are husband and wife, and that their true legal names now are and they are known as Armand d'Aleria and Kate I. d'Aleria, commonly called Count and Countess d'Aleria.

WHEREFORE, PLAINTIFFS pray judgment as asked for in the original complaint herein, that the names of Armand d'Aleria and Kate I. d'Aleria be substituted in the original action in place and stead of Harold A. Adrian and Kate I. Nixon as the true and correct names of both of the defendants herein, and for such additional relief as to the Court may seem just and equitable in [18] the premise, and costs herein.

_____,

Attorney for Plaintiffs.

State of California,
City and County of San Francisco,—ss.

Charles Shirey, being first duly sworn, says: That he is one of the plaintiffs named in the within and foregoing supplemental complaint, that he has read the same and knows the contents thereof, that the same is true of his own personal knowledge except as to matters therein stated on his information or belief and as to those matters he believes it to be true.

CHARLES SHIREY.

Subscribed and sworn to before me this 28th day of November, 1921.

[Seal] RAY S. FEDER,
Notary Public in and for the City and County of San Francisco, State of California. [19]

(Title of Court and Cause.)

(Stipulation That Plaintiffs may File Their Supplemental Complaint, etc.)

IT IS HEREBY STIPULATED, agreed and consented to by and between the respective parties hereto as the defendants herein, that the plaintiffs herein may file their supplemental complaint in the above-entitled action annexed thereto.

Dated this 28th day of November, 1921.

MILLER, THORNTON, WATT and MILLER,
MILLER, THORNTON and MILLER,
Attorneys for Defendants.

Approved Nov. 29, 1921.

FRANK H. RUDKIN.

Rec'd a copy of within supplemental complaint and stipulation this 28th day of November 1921.

MILLER, THORNTON, WATT & MILLER,
MILLER, THORNTON & MILLER,
Attys. for Dfts.

[Endorsed]: Filed Nov. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 21st day of December, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 16,252.

CHARLES SHIREY et al.

vs.

HAROLD A. ADRIAN et al.

(Order for Judgment, etc.)

The parties and the jury being present as heretofore the trial hereof was resumed. Genevieve Johnson and John Neff were sworn and testified on

behalf of plaintiffs in rebuttal and Jennie Shirey and James Shirey were recalled and further testified on behalf of plaintiffs in rebuttal. Mrs. Kate I. d'Aleria was recalled and testified on behalf of defendants in surrebuttal. The evidence being closed, counsel made their arguments to the Court and jury, at the conclusion of which the Court having instructed the jury, the jury, at 11:20 o'clock A. M., retired to deliberate upon their verdict. At 11:45 o'clock A. M. the jury returned into court and being asked if they had agreed upon their verdict, replied in the affirmative and returned the following verdict, which said verdict was ordered recorded, namely: "We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey $10,000.00
2. For plaintiff Charles Shirey for lost services of wife and expenses.....$2,000.00

Total.....$12,000.00

JAS. W. HARRIS,
Foreman. [21]

Ordered that the jury be discharged from further consideration hereof. Further ordered that judgment be entered herein in accordance with said verdict and for costs against Armand d'Aleria and Kate I. d'Aleria, defendants, substituted in place and stead of Harold A. Adrian and Kate I. Nixon. Further ordered that defendants have to stay execution for a period of thirty (30) days. [22]

(Title of Court and Cause.)

Verdict.

We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey $10,000.00
2. For plaintiff Charles Shirey for lost services of wife and expenses...$2,000.00

Total ...$12,000.00

JAS. W. HARRIS,
Foreman.

[Endorsed]: Filed Dec. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

(Title of Court and Cause.)

Judgment on Verdict.

This cause having come on regularly for trial upon the 20th day of December, 1921, being a day in the November, 1921, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; W. C. Cavitt, Esq., appearing as attorney for plaintiffs and H. B. M. Miller, Esq., appearing as attorney for defendant, Kate I. d'Aleria; and the trial having been proceeded with on the 21st day of December, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions

of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey $10,000.00
2. For plaintiff Charles Shirey for lost services of wife and expenses $2,000.00

Total....$12,000.00

JAS. W. HARRIS,
— Foreman."

and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Charles Shirey and Jennie Shirey, husband and wife, plaintiffs, do have and recover of and from Armand d'Aleria and Kate I. d'Aleria, defendants, the sum of Twelve Thousand and no/100 ($12,000.00) Dollars, together with their costs herein expended taxed at $64.70.

Judgment entered December 21, 1921.

WALTER B. MALING,
Clerk. [24]

In the United States District Court, Northern Division of California, Second Division.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also Known as Mrs. GEORGE NIXON,

Defendants.

(Stipulation Extending Matters Over Term, and Allowing Attention Thereto Outside of California.)

IT IS HEREBY STIPULATED by and between the parties to the above-entitled cause that any and all steps, actions or proceedings taken, or which may hereafter be taken by the defendants above named, or either of them, with a view to obtaining a new trial of said cause, or in the preparation of a bill of exceptions therein, or for the purpose of suing out a writ of error therein, to the United States Circuit Court of Appeals, or for the purpose of taking appeal from the judgment heretofore made and entered herein, or for the doing of any of the things necessary to be done for the accomplishment of any of such objects, may be taken after the present term of said court with the same force and effect as if taken during the present term.

It is also further stipulated by and between the parties to the above-entitled cause that the Honorable Frank H. Rudkin, Judge of the United States District Court at Spokane, Washington, before

whom said cause was tried, may pass upon, settle, deal with and decide in his said district and outside of the Northern Division of California, Second Division, any petition for a new trial, any bill of exceptions, any application for a writ of error to the United States Circuit Court of Appeals, and any appeal to said Court that [25] may be hereafter made, applied for or taken by the defendants above named, or either of them, with the same force and effect as if such matters or things were passed upon, settled and decided by said Judge in the Northern Division of California, Second Division, and that for that purpose any and all papers and proceedings that it may be necessary for him to have before him in so doing may be forwarded to him by the Clerk of this Court at Spokane, Washington.

Dated, this 28th day of December, 1921.

W. C. CAVITT,
Attorney for Plaintiff.

MILLER, THORNTON, MILLER and WATT,
MILLER, THORNTON and MILLER,
Attorneys for Defendant.

Good cause appearing to me therefore, it is so ordered.

Dated, this 28th day of December, 1921.

(Sgd.) FRANK H. RUDKIN,
District Judge.

[Endorsed]: Filed Dec. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

(Opinion and Order Denying Motion for a New Trial.)

W. C. CAVITT, Esq., Attorney for Plaintiff.

MILLER, THORNTON, MILLER & WATT, Attorneys for the Defendant Mrs. Nixon.

RUDKIN, District Judge:

This was an action to recover damages for injuries to person and property resulting from a collision between two automobiles. The automobile causing the injuries was owned by the defendant Nixon but at the time of the accident was driven by the defendant Adrian. The jury returned a verdict in favor of the plaintiffs and against both defendants. The defendant Nixon has moved for a new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passion or prejudice;

2. Insufficiency of the evidence to justify the verdict;

3. That the verdict is against law.

4. Error of law occurring at the trial and excepted to at the time.

The injuries to the plaintiff Jennie Shirey were serious and permanent and it cannot be said as a matter of law that the verdict was excessive or was influenced by passion or prejudice.

The other three grounds of the motion may be considered together, because unless the jury was

warranted in finding that the act causing the injuries was committed by the defendant Adrian within the scope of his employment and in the line of his duty as agent for the defendant Nixon, there was no evidence to justify the verdict; the verdict was against the law as laid down by the Court in its charge to the jury, and the Court should have directed a verdict in favor of the moving defendant. There [27] was little or no conflict in the testimony. According to the testimony of defendant Nixon, prior to the accident the two defendants had made a call on a friend and upon their return to the St. Francis hotel she left the car and directed the defendant Adrian to take it directly to the Class A Garage, on Post Street. According to the testimony of the defendant Adrian he was directed to take the car to the garage but informed the defendant Nixon that he would first go to Market Street to see a music publisher. He then drove the car to the Pantages Theater, on Market Street, and thence to Turk Street, on his way to Golden Gate Avenue for a detour, or a little ride. There he picked up a friend who asked him to drive him to the Fairmont Hotel, and on the way to the hotel the accident in question happened. The sole question in the case is, therefore, was the defendant Adrian acting within the scope of his authority and in the line of duty when the accident happened. The rule on this subject is thus stated by the Supreme Court of Connecticut in the well-considered case of Ritchie vs. Waller, 63 Conn. 155.

"Whether, then, the act of a servant, for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment, or not, must, from the nature of things, in most cases be a question of fact, to be determined as such by the jury or other trier, because no general rule of law has been, or probably can be, laid down, the application of which will determine the matter in all cases. Sometimes, however, this question is determined by the court as a matter of law. But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has [28] been generally held to be one of fact and not of law. In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the Court may and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the Court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving

merely a question of fact, to be left to the jury or other trier of such questions."

Again the Court said:

"In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. 'Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but where there is not merely deviation, but a total departure, from the course of the master's business, so that the servant may be said to be "on a frolic of his own," the master is no longer answerable for the servant's conduct.' "

In this case, no doubt, the servant departed from the strict line of duty, but the extent of the deviation or departure is not shown, except to one familiar with the city and its different streets. But aside from this the servant was still in the act of taking the automobile to the garage, though in a roundabout way, [29] and whether his deviation or departure from the direct course was sufficient to relieve the master from all responsibility for his acts was, in my opinion, a question for the jury. To grant a new trial at this juncture would be a gross injustice to the plaintiffs if the ruling

should be erroneous, because they have no right of appeal from such an order. On the other hand, if the Court errs in denying the new trial its ruling may be reviewed and corrected by the Appellate Court without further trial or further expense.

The motion for a new trial is, therefore, denied. March 11th, 1922.

[Endorsed]: Filed Mar. 11, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

In the District Court of the United States, Northern Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Sometimes Known as Mrs. GEORGE NIXON, Whose True Names are ARMAND M. d'ALERIA, and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Notice of Intention to Apply for a Writ of Error, and Refusal of Codefendant to Join.

To the Defendant Harold A. Adrian, also Known as A. M. d'Aleria:

You are hereby notified that on the 21st day of December, 1921, a verdict and judgment was ren-

dered and entered in the above-entitled cause on the trial thereof in favor of the plaintiffs therein and against the defendants for the sum of Twelve Thousand Dollars ($12,000.00); and that the undersigned, who is sued herein as Kate Nixon and Mrs. George Nixon, and by supplemental complaint filed herein is named as Catherine I. d'Aleria, is desirous of taking such steps as may be necessary to have said judgment reviewed by the United States Circuit Court of Appeals at San Francisco, on a writ of error, and hereby requests that you endorse hereon either your consent to join with her in her application for said writ of error and in prosecuting the same or your refusal so to do, for the reason that such consent or refusal is required by the law relating to applications for writs of error.

Dated, this 26th day of January, 1922.

KATE I. d'ALERIA.

Sued Herein as Kate Nixon. Mrs. George Nixon, and Catherine I. d'Aleria.

I, the undersigned, A. M. d'Aleria, sued herein as Harold A. Adrian, refuse to join in the application for a writ of error referred to in the foregoing notice, a copy of which has been served upon me this day at Chicago, Illinois.

Dated, Chicago, Illinois, this 2d day of February, 1922.

A. M. d'ALERIA.

Acknowledgment.

State of Illinois
County of Cook,—ss.

BE IT KNOWN, that on this 2d day of February, 1922, before me personally appeared A. M. d'Aleria, to me personally known to be the signer and sealer of the foregoing instrument, and he freely acknowledged that he voluntarily executed the same for the uses and purposes therein set forth.

[Seal] THOMAS M. NORTON,
Notary Public.

My Commission expires July 11, 1925. [31]

Received a copy of the within instrument this 16th day of March, 1922, a writ of error and refusal of codefendant to join.

W. A. CAVITT,
Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the United States District Court, Northern Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Also Known as Mrs. GEORGE NIXON, Whose True Names are ARMAND M. d'ALERIA and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that, on the 20th and 21st days of December, 1921, the above-entitled cause came on regularly for trial before the Court, Honorable Frank H. Rudkin, Judge, sitting with a jury, upon the amended complaint and the supplemental complaint of the plaintiffs and the answer to said amended complaint of the defendant Mrs. Kate Nixon (whose true name is Kate I. d'Aleria)' and on the default of Harold A. Adrian (whose true name is Armand M. d'Aleria), Mr. W. C. Cavitt appearing as attorney for the plaintiffs and Mr. H. B. M. Miller (representing Miller, Thornton, Miller and Watt, Thornton and Miller) appearing as attorneys for the defendant Mrs. Nixon, and the following proceedings were had and testimony taken:

Testimony was introduced on behalf of the plaintiffs and in support of their amended complaint by which it was shown that plaintiffs suffered a loss and damage resulting to them from a collision between an automobile being operated by the defendant Harold A. Adrian and one operated by the plaintiff Charles Shirey; that said collision was caused by and through the carelessness [33] and negligence of the said defendant Harold A. Adrian, and that the automobile being driven by him, the said Adrian, at the time of said collision was the property of the said Kate Nixon.

Thereupon plaintiffs closed their case.

Testimony of Mrs. Nixon, for Defendants.

The defendant Mrs. NIXON was then called as a witness on behalf of herself, and on being first duly sworn testified as follows, to wit:

Direct Examination.

I am the person sued in this case as Kate Nixon. Since the commencement of this action, I and Mr. d'Aleria, who is the same person sued herein as Harold A. Adrian, were married. We are not living together now as man and wife, and a suit is pending against him by me for divorce.

I was the owner of the Locomobile touring car which collided with plaintiffs' Studebaker, but at the time of that accident I was not in the car, and it was not being used by anyone under my instructions or authority.

(Testimony of Mrs. Nixon.)

Mr. MILLER.—Q. Harold Adrian was driving the car at the time of the accident, was he not?

Mr. CAVITT.—I object to that on the ground that it is immaterial, irrelevant and incompetent and calls for a conclusion of this witness.

The COURT.—You have proved it. Why should you object to it.

Mr. CAVITT.—I have proved it.

Mr. MILLER.—All right, I will take your proof then.

Q. Had you any talk with Harold Adrian shortly prior to this accident with relation to this Locomomobile; and if so, state what it was.

Mr. CAVITT.—One moment. I object to that on the ground it is immaterial, irrelevant and incompetent, it is hearsay, not had in [34] the presence of either of the plaintiffs in this case and a self-serving declaration.

The COURT.—How are you going to prove authority, if there was authority, if you cannot prove it by the party from whom the authority was derived? Objection overruled.

Mr. CAVITT.—We note an exception.

A. I had asked him to take it directly from the Class A Garage on Post Street.

The COURT.—From what point?

A. From the Powell Street entrance of the St. Francis.

Mr. MILLER.—Q. Where was that Class A. Garage?

A. At 737 or 735 Post Street.

(Testimony of Mrs. Nixon.)

Q. And the St. Francis Hotel is located on Powell Street extending from Post to Geary?

A. From Post to Geary.

Q. Now, was Adrian your chauffer?

A. He was not.

Q. What use had that car been put to immediately prior to your talk with him?

A. We had been to call on some friends out on Palm Avenue.

Q. And you got back to the St. Francis?

A. And drove back to the St. Francis.

Q. That was about what time, Mrs. d'Aleria?

A. Somewhere about eleven, I do not know exactly, but it was eleven or a quarter past eleven.

Q. When you got out of the car at that time, tell the Court and jury just what you stated to him?

Mr. CAVITT.—I object to that on the ground that it is immaterial, irrelevant and incompetent, hearsay and a self-serving declaration.

The COURT.—Objection overruled. [35]

Mr. CAVITT.—Exception.

A. We drove to the Powell Street entrance of the St. Francis, and I said to him, "Now, you take the car up to the garage right away and leave it there." That was the whole conversation.

Q. What was Adrian's business?

A. He played the Wurlitzer organ in different theatres.

Q. He was a musician?

A. He was a player of the Wurlitzer organ.

Q. He was an organist? A. Yes.

(Testimony of Mrs. Nixon.)

Cross-examination.

Mr. Adrian's real name is Armand d'Aleria.

Mr. CAVITT.—Q. Where were you living at that time?

A. I was living in Reno.

(Witness continuing:) At the time of this accident I was living at the St. Francis and Mr. d'Aleria was living at the St. Francis Hotel. I think I had been living at the hotel about a week. Mr. Adrian drove the car that night and once or twice before. I think he drove the car once or twice while we were in Reno. He did not drive it from Reno to Los Angeles. He did not drive it from Los Angeles to San Francisco. I now state he has only driven the car once or twice before the accident. He got the car from the garage with my permission two or three times. I don't know exactly, I don't remember. When the car was first taken to the Class A. Garage I think the boy who was driving for me took it there; his name I believe was Clarence; Clarence had been driving the car two or three months I think. Mr. Adrian was in my employ in Reno as a musician. He may have driven the car once or twice in Reno. I do not say definitely he drove the car only four times. I say a few times. I do not think over a half a dozen times. I do not believe more than half a dozen times altogether [36] during the three months he was in my employ as a musician at Reno. I owned this same Locomobile touring car all of that time. He did not drive the

(Testimony of Mrs. Nixon.)

car after the accident. About the first time he drove my car in Reno I think was the latter part of March or fore part of April. The night of the accident Mr. Adrian and myself had been out to Mr. Arthur Reese's on Palm Avenue in the Richmond District, and got back to the St. Francis at about eleven or half past eleven, right around in there some place. The car had been kept by me in the Class A. Garage a week or two, something like, a week I think it was, I do not remember exactly; I had in San Francisco about two weeks something like that; I don't remember exactly; that is the only garage in which the car was kept at that time.

Redirect Examination.

Mr. Reese was a music publisher here in San Francisco and had a place down on Market Street, which I do not think was kept open at night.

Mr. MILLER.—We would ask the privilege of reading the deposition of Mr. Adrian; it is very short.

Mr. CAVITT.—I would like to look at that. I had no notice of it.

The COURT.—Was there no appearance by the plaintiffs at the time it was taken?

Mr. MILLER.—No.

Mr. CAVITT.—We did not have notice of when it was to be taken, or where it was going to be taken.

Mr. MILLER.—I think you are in error. We find among the papers in this case an affidavit of

(Testimony of Mrs. Nixon.)

Roswell Miller, to the effect that he served a notice on the plaintiff's attorney in the case [37] of the application for the taking of the deposition Harold A. Adrian on behalf of Kate Nixon—affidavit on application for commission to take deposition on direct interrogatories to be propounded to the defendant Harold A. Adrian, by leaving copy of said notice, affidavit and interrogatories on the only desk in the law office of W. C. Cavitt, the said plaintiff's attorney herein, said desk being in a conspicuous place in said office, to wit, the desk used by W. C. Cavitt while engaged in attending to his business as attorney at law. When said notice, affidavit and direct interrogatories were so left on said desk, said office was open but no person was in it, and affiant was notified at said time by F. J. Castlehun, an attorney at law, who shares a waiting-room with said W. C. Cavitt, that the said W. C. Cavitt was at said time not in the city and county of San Francisco, State of California, and the said F. J. Castelhun refused to admit service in the said notice, affidavit and direct interrogatories, or any of them. On the strength of that, a commission was issued by the Court for the taking of this testimony on the 4th day of October, 1920, to a notary public in Los Angeles, to take the deposition of Harold Adrian upon interrogatories that were presented with it.

Mr. CAVITT.—If your Honor please, this is the first time that I have seen this affidavit. The affi-

(Testimony of Mrs. Nixon.)

davit does not state that my office was open for business. The affidavit does not state that it was delivered to any person in charge of my office. As a matter of fact, I left the city and county of San Francisco on the 24th day of August, 1920, and went to my ranch and did not return to San Francisco until the 25th of October, 1920, and I had absolutely no notice that an application was ever made for this commission, and it was taken without any notice to plaintiffs [38] in this action, and plaintiffs had no notice whatever of it.

Mr. MILLER.—It is not a fact that I told you I was going to apply for a commission to take the deposition?

Mr. CAVITT.—Sure, you told me, and you even asked me to stipulate, and I refused to stipulate.

Mr. MILLER.—You refused?

Mr. CAVITT.—Yes.

The COURT.—Let me see the rules.

Mr. CAVITT.—As a matter of fact, I never had any notice, at all, and the papers were never delivered to me, and the fact is M. Castelhun told him he would not admit service on it. There is nothing in the affidavit to show that it was left with any person in my office, or that my office was open for business.

The COURT.—Rule 36 is: "Service of all papers other than writs and process may be made either by the marshal or by any person competent to be a witness in the cause in the following manner:

"If the service be not personal, it may be made by

(Testimony of Mrs. Nixon.)

leaving a copy of the paper to be served at the address left with the clerk as provided by Rule 4, with some person of suitable age and discretion, if any such be found at such address, and if not, then by leaving said copy in some conspicuous and comparatively secure place at such address."

Mr. CAVITT.—It does not appear by the affidavit, if your Honor please, that it was left with any person of suitable age and discretion.

Mr. MILLER.—It does not need to be. There was nobody there to take it.

The COURT.—There was no person in your office.

Mr. CAVITT.—No, there was no person in my private office. [39]

The COURT.—"By leaving said copy in some conspicuous and comparatively secure place at such address." Wasn't that done?

Mr. CAVITT.—I don't know. I was absent from the city and county of San Francisco.

The COURT.—The objection is overruled.

Mr. CAVITT.—Will your Honor permit me, before you make your ruling, to testify that I was absent from the city and county of San Francisco from the 24th day of August, 1920, to the 25th day of October, 1920?

Mr. MILLER.—I concede that without your having to testify to that.

The COURT.—The Court has made an order based on this, and you will have to proceed to vacate the order before the Judge who made it before I will entertain any testimony here.

(Testimony of Mrs. Nixon.)

Mr. CAVITT.—We note an exception.

Mr. MILLER.—(Reading:) "In the United States District Court, Northern District of California, Northern Division, Second Division, Charles Shirey and Jennie Shirey, Husband and Wife, Plaintiffs, vs. Harold A. Adrian and Kate Nixon, Sometimes Known as Mrs. George Nixon, Defendants, No. 16252.

"BE IT REMEMBERED that, pursuant to the attached commission, and on the 7th day of February, 1921, at 10:30 o'clock A. M. thereof, at 5226½ Boulevard, in the City of Los Angeles, County of Los Angeles, and State of California, before me, Elmer L. Kincaid, a Notary Public in and for said Los Angeles County, duly appointed and commissioned to administer oaths, etc., and commissioner duly appointed in the above entitled matter to propound the attached direct interrogatories to Harold A. Adrian, as a witness on behalf of the defendant, Kate Nixon, in the above-entitled action, personally appeared before me the said Harold A. Adrian and made the [40] following answers to the attached interrogatories propounded by me.

The deposition of Harold A. Adrian was then offered, objected to, objection overruled and then received and read in evidence, as follows:

Deposition of Harold A. Adrian, for Defendants.

My name is Harold A. Adrian, aged twenty-two years, living at 5226½ Sunset Boulevard, and am a musician; I am one of the defendants in this case and know my codefendant sued herein as Kate Nixon and Mrs. George Nixon. On the 19th and

(Deposition of Harold A. Adrian.

20th days of April, 1919, I was living at the St. Francis Hotel in San Francisco, which is on the west side of Powell Street between Geary and Post Streets. Mrs. Nixon was living at the St. Francis Hotel on those dates.

About 12:30 A. M. on Sunday, April 20th, 1919, I was driving and was in charge of a Locomobile automobile owned by Mrs. Nixon, at or near the intersection of Golden Gate Avenue and Gough Street, in the city and county of San Francisco, State of California. The defendant Mrs. Nixon was not at that time with me in that automobile; she had been with me in that automobile that evening when I was driving and operating the same, and she left the automobile about twenty minutes before the accident, which occurred at the intersection of Golden Gate Avenue and Gough Street; I dropped her at the St. Francis Hotel.

This automobile was kept in the Post Street Garage sometimes, and at other places.

Mr. CAVITT.—I object to that as immaterial, irrelevant and incompetent, and calling for the conclusion of the witness, and not the best evidence.

The COURT.—Where the garage was located? Why wouldn't it be the best evidence? [41]

Mr. CAVITT.—The best evidence would be the proper location of it on the map of the city and county of San Francisco.

The COURT.—The objection is overruled.

Mr. CAVITT.—Exception.

Mr. MILLER. (Reading):—"To Direct Inter-

(Deposition of Harold A. Adrian.)

rogatory 13 he answers: I don't know the exact location."

Q. 14. State whether or not, at the time Mrs. Nixon left said automobile, she gave you any instructions with relation to the same.

Mr. CAVITT.—I object to that, if your Honor please, on the ground that it is immaterial, irrelevant and incompetent, hearsay, a self-serving declaration.

The COURT.—The objection is overruled.

Mr. CAVITT.—Exception.

A. I was instructed to take the car to the garage, but first told her I was going down to Market Street to see a music publisher down there by the name of Reese, and then I was going to take the car to the garage.

"Q. 15. If your answer to the last foregoing interrogatory be that she instructed you to take said automobile to the Post Street Garage, state whether or not you took the same directly to said garage?

"To Direct Interrogatory 15 he answers: Not directly to the garage, but did so after I had finished my business."

"Q. 16. If your answer to the last foregoing interrogatory be that you did not take said automobile direct to said Post Street Garage after Mrs. Nixon got out of said automobile, state where you went with it?

"To direct interrogatory 16 he answers: I went to Market Street to the Pantages Theater Building, and then to Turk Street, on the [42] way to

(Deposition of Harold A. Adrian.)

Golden Gate Avenue, for a detour, a little ride. There I picked up Harry Hume, who wanted me to drive him to the Fairmont, and I was going to take him there when the accident happened."

Mr. CAVITT.—I move to strike out that part of the answer where he says he wanted him to do so, as immaterial, incompetent and irrelevant and hearsay.

The COURT.—He just said where he was going. I overrule the objection.

Mr. CAVITT.—Exception.

About the hour of 12:30 A. M. on Sunday, April 20th, 1919, a collision occurred on the intersection of Golden Gate Avenue with Gough Street, between said Locomobile automobile and a Studebaker automobile being driven or operated by the plaintiff Charles Shirey.

"Q. 18. If your answer to the last foregoing interrogatory be in the affirmative, state whether or not, at the time of such collision you were in charge of, or were operating, or were driving said Locomobile automobile?"

Mr. CAVITT.—I object to the question on the ground that it is immaterial, irrelevant and incompetent, calling for his conclusion as to whether or not he was in charge of the car.

The COURT.—That part of it is probably a conclusion. You may read the answer.

Mr. CAVITT.—Exception.

Mr. MILLER.—To direct Interrogatory 18 he answers "Yes."

(Deposition of Harold A. Adrian.)

The COURT.—I might say that the last answer you read was not responsive to the question. He was asked a double question and he answered "Yes."

Mr. MILLER.—I presume it was intended as an answer to both of them, that he was in charge and operating, and driving. I presume that was the idea that was conveyed. It was my error in putting the question in that way. [43]

Q. 19. If your answer to the last foregoing Interrogatory be in the affirmative, state whether or not anyone was with you in said automobile, and if so who it was.

"A. Yes. Harry Hume and another party unknown to me by name."

"Q. 21. State for whom and for what purpose you were driving or operating said automobile."

Mr. CAVITT.—Objected to as immaterial, irrelevant and incompetent, and calling for the conclusion of the witness.

The COURT.—He may answer.

A. For the purpose of seeing a Mr. Rees at the Pantages Theater building about the formation of a music publishing company, which business was my individual business.

"Q. 41. Were you ever at any time in the employ of Mrs. Nixon as a chauffer?"

Mr. CAVITT.—I object to that as calling for the conclusion of the witness.

The COURT.—Overruled.

Mr. CAVITT.—Exception.

A. No.

(Deposition of Harold A. Adrian.)

"Q. 42. Were you ever at any time in the employ of Mrs. Nixon in any capacity, and if so, in what capacity?"

Mr. CAVITT.—Same objection.

The COURT.—The same ruling.

Mr. CAVITT.—Exception.

A. Concert organist.

Mr. MILLER.—That is our case.

Testimony of Genevieve Johnson, for Plaintiffs (In Rebuttal).

The plaintiffs above named then called in rebuttal:

GENEVIEVE JOHNSON, who being first duly sworn, testified as follows:

Mr. CAVITT.—Q. What is your name?

A. Genevieve Johnson.

Q. Where, if anywhere, were you employed about the month of April, 1919?

A. Class A Garage.

Q. How long had you been employed there?

A. Since February, 1914.

Q. What were your duties in the Class A Garage? [44]

A. Bookkeeper and in charge of the office.

Q. Did you know one Harold A. Adrian?

A. I did.

Q. Do you recall whether or not on or about April 19 or 20—prior to April 19, 1919, if at any time Harold Adrian brought into the Class A Garage an automobile?

Mr. MILLER.—I object to that as immaterial,

(Deposition of Genevieve Johnson.)

irrelevant and incompetent, unless it is connected with this case.

Mr. CAVITT.—That is preliminary, if your Honor please.

The COURT.—She may answer.

A. He brought a car into the garage, but I don't remember the date.

Mr. CAVITT.—Q. Was it prior to April 19, 1919?

A. I would not say the date, because I have not looked it up.

Q. You have not looked it up? A. No.

Q. Do you recall at any time in the month of April, 1919, when a Locomobile was brought in by Harold Adrian, in which he left instructions to send the bill to Mrs. Nixon at the St. Francis Hotel?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, a statement made by him not in the presence of this defendant, and in no wise binding upon the defendant, Mrs. Nixon.

The COURT.—This defendant has testified he drove the car only two or three times.

Mr. MILLER.—Down here, but not as to any charges in connection with it, or anything of that kind.

The COURT.—The charge is not material, but is to show what he had to do with the driving of the car. She may answer.

A. He brought the car into the garage and drove it out a number of times—came after it and took the car out.

(Deposition of Genevieve Johnson.)

Mr. MILLER.—I ask that it be stricken out as not responsive to the question.

The COURT.—Yes, the answer may be stricken. Answer the question asked. [45]

Mr. CAVITT.—Q. During the time that this car remained in the Class A. Garage, the Locomobile owned by Mrs. Nixon, I will ask you if at all times that Mr. Harold Adrian came in there and got the car he brought it back again?

Mr. MILLER.—I object to that, because it is indefinite; it might be one or two times, or it might be many.

Mr. CAVITT.—Q. At any time during the spring of 1919, from the month of April on.

A. He brought the car into the garage and took the car out of the garage—came after it several times again and took it out.

Mr. CAVITT.—That is all.

Cross-examination.

Mr. MILLER.—Q. When was this?

A. I don't remember the dates, because I have not looked them up.

Q. During what period of time was it?

A. I would not even say that, because Mrs. Nixon always kept her car there.

Q. Did it extend over a period of weeks, or months, or days, or what?

A. No, it was only for a short while.

Q. Have you any idea about how short?

A. No, I would not like to say.

(Deposition of Genevieve Johnson.)

Q. Have you any idea how many times he came in there and took the car?

A. Well, I remember a number of times he came in there and got the car.

Q. You say a number of times. Give us an idea of how many?

A. I know it was at least three or four times.

Q. At least three or four times?

A. Yes, probably more than that.

Q. You would not say it was in excess of that?

A. No, I would not make a positive statement.

Q. You would not say it was in excess of that?

A. You mean more than four times? [46]

Q. Yes.

A. Well, I know it was at least four times.

Q. At least four times? A. Yes.

Q. Was it during a period of a week, or during a period of two weeks, or three weeks, or what?

A. I do not remember.

Q. Was it every day?

A. I would not say that, either.

Q. You would not say whether it was every other day, either? A. No.

Q. You had no particular occasion to keep account of how many times this man took out that car or brought it in, any more than you did anyone else, did you? A. No.

Q. What is it that places it in your mind, nearly two years ago, that he came in there three or four times?

A. Because he brought the car in the garage, and

(Deposition of Genevieve Johnson.)

he came to me in the office and told me to send the bills to Mrs. Nixon at the St. Francis Hotel, as usual.

Q. Was there anyone else that did that besides him during that same period? A. No.

Q. In all other cases, people came in there and got their own cars and did not send anyone after them.

Mr. CAVITT.—I object to that as immaterial, irrelevant and incompetent.

A. Mrs. Nixon always had a driver before and it had been some boy we knew, and this boy we did not know until he came in after the car.

Mr. MILLER.—Q. She had always had a driver before. When, before, did she keep her car there?

A. Since 1914.

Q. Since 1914, how long prior to April was it that you had it there before?

A. That I don't remember.

Q. Did she keep the car steadily there since 1914?

A. No, off and on, whenever she was in San Francisco the car was [47] in the garage.

Q. Is there any particular incident connected with the matter which enables you now to remember what occurred in relation to this car in 1919?

A. The only thing that I remember is Mr. Adrian came into the office, and that I do remember.

Q. Did he come in on every occasion when he got it? A. No.

Q. How many times did he come into the office and tell you that?

(Deposition of Genevieve Johnson.)

A. He just came in the first time and told me.

Q. Now, then, that is the only thing that recalls the matter to which you have testified to your mind?

A. The gasoline station is right at the office door, and there can be easily seen from the office anyone going out.

Q. How do you know, then, other than the fact that he came in and told you what you have stated, that he came and got that car on a number of occasions?

A. Because I have seen him go out of the door with the car.

This is not all of the evidence, but it is all that is necessary on the hearing of this writ of error.

Thereupon the case was submitted to the jury and the following instructions were by the Court given to said jury:

Charge to Jury.

The COURT.—(Orally.) Gentlemen of the Jury: This is an action by the plaintiffs, Charles Shirey and Jennie Shirey, jointly, seeking to recover damages in the sum of $51,013.00, [48] against Armand d'Aleria and Kate d'Aleria, for injuries alleged to have been received by the said Jennie Shirey on the 20th day of April, 1919, at or near the easterly side of Gough Street and near the northerly side thereof on the crossing of Gough Street and Golden Gate Avenue, while she was riding in a Studebaker automobile with her husband Charles Shirey and others, which said Studebaker automo-

bile was then proceeding in a northerly direction along and over the easterly side of Gough Street on said crossing, and along and over the easterly side of said intersection of said Gough Street and Golden Gate Avenue, and in the second place, by Charles Shirey individually, against said defendants, seeking to recover damages against said defendants in the sum of $11,013, for alleged loss of services, of his wife and necessary expenses for caring for her injuries, and for loss of clothing and damages to said Studebaker automobile. You are instructed that if you find from the evidence that the defendants were negligent in this case, and that such negligence of said defendants was the proximate cause of the injuries complained of in the complaint, then the only matter for you to determine is the amount of damages, if any, to be allowed by you. You are further instructed that this is the only action that may be brought by them, or either of them, under the law of this state for damages growing out of said accident to said Jennie Shirley, and the damages in the aggregate must represent the loss to the plaintiffs for the injury to the wife, if any, as well as the loss, if any, to the husband; and the elements entering into such loss or damages are hereinafter defined in these instructions.

In determining what damages you are to give to the plaintiffs Charles Shirey and Jennie Shirey for the injuries received by the said Jennie Shirey, as set up in the amended complaint, you may award them damages in such sum as in your judgment will [49] fairly and reasonably compensate for the in-

juries the plaintiff Jennie Shirey has received; and in estimating the damages in this behalf, you may consider that before the accident was her health and physical activity, and the extent and nature of her wounds, hurts, bruises, if any, and also the extent to which, if at all, the injuries she received, or any then, are permanent in their character, as well as the physical pain and mental anxiety which said Jennie Shirey has suffered, or will certainly suffer in the future, because of her injuries. The law prescribes no exact measure by which such damages may be estimated, but leaves it to the sound discretion of the jury to fix the amount thereof, as under all the circumstances may be deemed just and proper, not exceeding the amount sued for in this behalf, to wit, $40,000.00. The law does not require that the plaintiffs present any direct evidence to show the amount of damages they have sustained in this behalf,—the amount of money which would compensate for the injuries said Jennie Shirey has received; all that is necessary in this behalf is to show to the jury the extent of her injuries, and that they were proximately caused by the accident; then it is for the jury to determine in the manner I have indicated the amount of damages which ought to be awarded to plaintiffs therefor.

While it is incumbent upon the plaintiffs to prove their case, the law does not require from them an absolute demonstration that is such a degree of proof, excluding possibility of error, as produces absolute certainty, because such proof is rarely possible; moral certainty is all that is required, or the

degree of proof which produces conviction in an unprejudiced mind. By a preponderance of evidence it is not necessarily meant a greater number of witnesses, but if the plaintiffs have proven their case by such evidence as constitutes and produces conviction [50] in the mind of the jury, then they have proven their case by a preponderance of evidence. Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

You are instructed that the words "mental anxiety," as used in the foregoing instructions, mean that mental worry, distress, grief and mortification which a person may suffer as growing proximately out of an injury received in an accident, and are proper component elements of that mental suffering and anxiety for which the law entitles an injured person to redress if it appears from the testimony that such mental anxiety is proximately caused and the injuries received in such accident.

Under an ordinance of the city and county of San Francisco, known as Ordinance 1857 and amendments thereto, and the Motor Vehicle Act, both of which are in evidence, Charles Shirey as he drove north on Gough Street towards Golden Gate Avenue had the right of way over vehicles which were simultaneously approaching the intersection from

his (Charles Shirey's) left hand side, and the Court charges you that as Charles Shirey approached the said intersection and until he could see beyond the same, he had the right to assume that he would be accorded the right of way and that any vehicle simultaneously approaching the said intersection on Gough Street and from his (Charles Shirey's) left hand side would do so in reasonable manner and that he (Charles Shirey) would be given the right of way over said intersection. [51]

The defendant's plea of contributory negligence in this case is an affirmative plea, and the burden of proving such contributory negligence is upon the defendants and you must therefore believe by a preponderance of evidence that they have established such plea before you can find for them, as a bar to the rights of the plaintiffs, if any, to recover in this case, because under the law, a plea of contributory negligence is an affirmative one, and the burden is always upon the defendants to establish such plea of contributory negligence by a preponderance of the evidence of the whole case.

Negligence is defined as the omission to do something which a reasonable man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or in doing something which a prudent man would not do. It is not intrinsic or absolute, but always relating to some circumstances of time, place or persons.

If you find from the evidence that the plaintiff Jennie Shirey, before the accident in controversy here, performed services for her husband Charles

Shirey as alleged in the complaint, and shall further find that she has been unable since said accident, and will be unable in the future, to perform the same services by reason of any injuries received therein, then I instruct you that you should find for the plaintiff Charles Shirey such a sum in damages as will reasonably and fairly compensate him for such loss of services; and in addition thereto you may allow him such a sum as the evidence shows he has necessarily or reasonably incurred in employing physicians and surgeons to treat the injuries of his said wife, and also any reasonable or necessary amount of money paid by him to any nurse or nurses, and for medicine and the treatment of her said [52] injuries, in all not exceeding the total amount alleged in the complaint in this behalf, to wit, $11,013.00.

In weighing the evidence you are to consider the credibility of the witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character as shown by their evidence, their manner on the stand, their relation to the parties, if any, their degree of intelligence, the reasonableness or unreasonableness of their statements. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty or integrity, or his motives, or by contradictory evidence. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some

other witness, or comport with some fact or facts otherwise known or established by the evidence.

In view of the fact that this is an action for the plaintiffs for injuries to the wife, and also by the husband for loss of services of his wife, and for expenses for repairing his automobile and alleged expenses, I instruct you that in fixing the damages, if any, if you find the defendants were negligent, you should fix the amount in each separate matter, irrespective of the other, and should not consider whether the total amount awarded is large or small, but you should fix the amount in each instance according to the instructions I have given you on that issue. In the event that you find for the plaintiffs herein, you should return but one verdict for an amount which in your judgment will compensate both plaintiffs [53] for the damage and loss suffered by reason of the injury to the plaintiff Jennie Shirey, and for damages to the automobile, if any, as alleged in the complaint.

When you have agreed upon a verdict herein and the same is in favor of the plaintiffs, then in the blank verdict handed to you you will insert in its respective place the amount, if anything, awarded to the plaintiffs for the injuries to the plaintiff Jennie Shirey, and likewise insert in its respective place the amount, if any, awarded to the plaintiff, Charles Shirey, adding the same together, and have said verdict signed by your foreman and returned in open court.

I further charge you, Gentlemen of the Jury, as a matter of law, that the driver of this car did not

interpose any defense in this action, so that, so far as he is concerned, the only question you need to consider is the amount or measure of damages to which the plaintiffs are entitled. The liability of the other defendant depends upon the purpose for which the car was being used at the time of the accident, and upon the relationship that existed between the owner of the car and the driver. Upon this question I charge you as follows:

If you believe from all the evidence in the case that at the time of the accident in the amended complaint herein referred to, the automobile therein mentioned was in the possession of and under the control of the defendant Adrian, and was being operated by him for his own purposes and not in the transaction of any of the duties of his employment with the defendant Mrs. Nixon, and that while so operating said automobile the plaintiffs were, or either of them was, injured or damaged, in such case the defendant Mrs. Nixon cannot be held legally responsible for any such injuries or damages. In other words, Gentlemen of the Jury, the master is liable for the acts of [54] his agent or servant in the course of his employment, and within the scope of the agent's authority, but the master is not liable for the acts committed by the agent not in the course of his employment and not within the scope of his authority. If in this case this machine was driven for the purpose of the owner by this driver then she is liable for his acts and for his neglect. If, on the other hand, it was not driven for her purposes, or in her business, there can be no recovery,

even though it was so used by the driver with her consent.

Your verdict in any event in this case will be in favor of the plaintiffs as against the driver of the car. Whether it will be against the other defendant or not will depend upon your finding upon the question as to how he was driving the car at the time and for what purpose he was driving it.

Anything further, Gentlemen?

Mr. MILLER.—Would your Honor permit me to make one suggestion as to the last instruction you gave to the jury? I think it goes a little further than your Honor intended it to. As I understood it to be, "If you find from the evidence that the car was used by the defendant Adrian for the purposes of the owner, Mrs. Nixon would be liable." I presume your Honor intended by that, "If it was being used by him at the time of the accident for the purposes of Mrs. Nixon."

The COURT.—Certainly. At the time the injury was inflicted is the time my instructions relate to, of course.

Anything further?

Mr. MILLER.—We desire to take an exception, if the Court please, to the fact that the Court did not give the instruction requested, that the jury find in favor of Mrs. Nixon.

The COURT.—Yes. [55]

In the United States District Court, Northern Division of California, Second Division.

No. 16252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Also Known as Mrs. GEORGE NIXON, Whose True Names are ARMAND M. d'ALERIA and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions contains a true and correct copy of all portions of testimony of the witnesses given at the trial of said cause that are necessary to be used on the hearing of the writ of error herein, and also a true and correct copy of all of the instructions given by the Court.

It is also stipulated that said bill of exceptions may be settled, allowed and approved by the Court as the bill of exceptions to be used on the hearing of said writ of error and that the same may be used on the hearing of said writ of error.

Dated this 5th day of July, 1922.

W. C. CAVITT,
Attorney for Plaintiffs.
MILLER, THORNTON and MILLER,
W. I. GILBERT,
Attorneys for Defendant Kate I. d'Aleria. [56]

In the United States District Court, Northern Division of California, Second Division.

No. 16252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON Also Known as Mrs. GEORGE NIXON Whose True Names are ARMAND M. d'ALERIA and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Order Settling Bill of Exceptions.

The above-entitled cause having been tried in the above-entitled court before Honorable Frank H. Rudkin, a Judge of the United States District Court for the Eastern District of Washington, and it being stipulated by the parties to said cause that said bill of exceptions may be settled by said Judge in the State of Washington rather than in the city and county of San Francisco, State of California;

and that the foregoing bill of exceptions is true and correct in all respects, and that the same may be used upon the hearing of the writ of error, heretofore filed herein, before the Circuit Court of Appeals at San Francisco.

IT IS NOW ORDERED that said bill of exceptions be, and it hereby is, settled, allowed and approved; that the same is in all respects true and correct, and that the same may be used on the hearing of the writ of error heretofore filed herein in said United States Circuit Court of Appeals at San Francisco.

Dated, this 10th day of July, 1922.

FRANK H. RUDKIN,

[Endorsed]: Filed July 14, 1922. Walter B. Maling, Clerk. [57]

In the United States District Court, Northern Division of California, Second Division.

No. 16252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Also Known as Mrs. GEORGE NIXON Whose True Names are ARMOND M. d'ALERIA and KATE I. d'ALERIA, Husband and Wife.

Defendants.

Petition for a Writ of Error.

The defendant Kate I. d'Aleria feeling aggrieved by the verdict of the jury and the judgment entered thereon in the above-entitled cause on the 21st day of December, 1921, whereby it was adjudged that the plaintiffs have and recover from the defendants the sum of Twelve Thousand ($12,000.00) Dollars; and the defendant Armand M. d'Aleria having refused to join with his petitioner in a petition for a writ of error as appears by the notice and refusal hereinafter referred to, said petitioner Kate I. d'Aleria comes now by her attorneys Miller, Thornton and Miller and W. I. Gilbert and petitions said court for an order allowing her alone to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit according to the laws of the United States in that behalf made and provided, and in connection with this petition petitioner herewith presents and files her assignment of errors, and the notice and refusal above mentioned.

And your petitioner further prays that an order may be made fixing the amount of a supersedeas bond which she shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this Court be suspended, stayed [58] and superseded until the determination of said writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated, this 16th day of March, 1922.

W. I. GILBERT and
MILLER, THORNTON and MILLER,
Attorneys for said Petitioner.

Received a copy of the within instrument this 16th day of March, 1922, petition for writ of error.

W. C. CAVITT,
Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [59]

In the District Court of the United States, Northern Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN, and KATE NIXON, Sometimes Known as Mrs. GEORGE NIXON, Whose True Names are ARMAND M. d'ALERIA and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Assignment of Errors.

Now comes Kate I. d'Aleria, named in the complaint herein as Kate Nixon and Mrs. George Nixon and in the supplemental complaint served and filed

herein as Katherine I. d'Aleria, and serves and files in the above-entitled cause this assignment of errors upon which she will rely in the prosecution of her writ of error in the above-entitled action, and specifies in particular that in the records and proceedings in said cause as will appear in the transcript hereinafter to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there is manifest error as follows:

I.

That the United States District Court for the Northern Division of California, Second Division, erred in refusing to give to the jury the following instructions requested by this defendant, to wit:

> "You are hereby instructed that the plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon, you find a verdict in her favor and against the plaintiffs,"

(and because of such refusal said defendant duly excepted) for the reason that the evidence introduced at the trial of said cause was, and is, insufficient to justify the verdict against her because of [60] the fact that said evidence shows without any contradiction whatever:

1. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision the

damages claimed by plaintiffs occurred, the automobile of said defendant was not in her possession, or under her management or control, but was in the possession of and under the management and control of, and was being operated by the defendant Armand M. d'Aleria.

2. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision the damages complained of by plaintiffs occurred, the automobile of this defendant was not being operated or used by the said defendant Armand M. d'Aleria in the transaction of any of the business of this defendant, or in connection with any business of this defendant.

3. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision the damages complained of by plaintiffs occurred, the automobile of this defendant was being operated and used by the said defendant Armand M. d'Aleria solely and only for his own personal purposes.

4. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision [61] the damages complained of by plaintiff oc-

curred, the automobile of this defendant was being operated and used by the defendant Armand M. d'Aleria for his own personal purposes after he had been instructed by this defendant to take the same to the garage where she kept it, and was not being by him taken to said garage at the time of said collision.

5. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey, and that of this defendant, and as a result of which collision the damages complained of by plaintiff occurred, that the defendant Armond M. d'Aleria, who was operating said defendant's automobile, was not in the employ of said defendant as a chauffeur or to have any management or control of said automobile but solely and only as a musician, and that in operating and using said automobile he was not acting within the scope of any employment in which he was engaged by this defendant.

II.

That the United States District Court for the Northern Division of California, Second Division, erred in receiving and filing the verdict herein which was rendered by the jury in said cause for the following reasons:

1. That there was no evidence of any kind or character introduced at the trial of said cause which shows, or tends to show, that the automobile of the defendant Mrs. Nixon at the time of the accident in the complaint herein referred to was being used

by the defendant Armand M. d'Aleria, or by anyone for or in connection with any business or affairs of any kind or character of the said Mrs. Nixon, or within the scope of any employment in which he, or they, were engaged by her.

2. The evidence introduced at the trial of said cause does show, without any contradiction whatever that at the time of the [62] accident in the complaint in this action referred to, the automobile of the said Mrs. Nixon was being used by the said defendant Armand M. d'Aleria solely and only for his own private purposes, and in the transaction of his own personal business, which was not in any way connected with any business or affairs of the said Mrs. Nixon, or in connection with any matters or things within the scope of his employment by the said Mrs. Nixon.

3. That said verdict was against the law in that it is in direct violation of the following instruction given by the Court to the jury, to wit:

> "If you believe from all the evidence in the case that at the time of the accident in the amended complaint herein referred to, the automobile therein mentioned was in the possession of and under the control of the defendant Adrian, and was being operated by him for his own purposes and not in the transaction of any of the duties of his employment with the defendant Mrs. Nixon, and that while so operating said automobile the plaintiffs were, or either of them was, injured or damaged, in such case the defendant Mrs. Nixon cannot be held le-

gally responsible for any such injuries or damages. In other words, Gentlemen of the Jury, the master is liable for the acts of his agent or servant in the course of his employment, and within the scope of the agent's authority, but the master is not liable for acts committed by the agent not in the course of his employment and not within the scope of his authority. If in this case this machine was driven for the purpose of the owner by his driver then she is liable for his acts and for his neglect. If, on the other hand, it was not driven for her purposes, or in her business, there can be no recovery, even though it was so used by the driver with her consent.

"Your verdict in any event in this case will be in favor of the plaintiffs as against the driver of the car, whether it will be against the other defendant or not will depend upon your finding upon the question as to how he was driving the car at the time and for what purpose he was driving it."

Anything further, gentlemen?

"Mr. MILLER.—Would you Honor permit me to make one suggestion as to the last instruction you gave to the jury? I think it goes a little farther than your Honor intended it to. As I understood it to be, 'if you find from the evidence that the car was used by the defendant Adrian for the purposes of the owner, Mrs. Nixon would be liable.' I presume your Honor intended by that, if it was being used by him

at the time of the accident for the purposes of Mrs. Nixon.

"The COURT.—Certainly. At the time the injury was inflicted is the time my instructions relate to, of course." [63]

III.

That the United States District Court for the Northern Division of California, Second Division, erred in entering and filing a judgment herein in favor of the plaintiffs and against said defendant Mrs. Nixon upon the verdict rendered by the jury in said cause for the same reasons set forth and stated in paragraph II hereof, all of which reasons are hereby referred to, and made a part of this paragraph III, the same as if they were specifically incorporated herein.

WHEREFORE, the defendant Mrs. Nixon prays that the judgment of the said United States District Court made and entered in the above-entitled cause in favor of the plaintiffs and against her be reversed and that said Court be ordered and directed to make and enter in said cause a judgment in favor of the said Mrs. Nixon and against the plaintiffs.

MILLER, THORNTON and MILLER,
W. I. GILBERT,
Attorneys for Defendant Mrs. Nixon.

Received a copy of the within instrument this 16th day of March, 1922. Assignment of error.

W. A. CAVITT,
Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

In the United States District Court, Northern Division of California, Second Division.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also Known as Mrs. GEORGE NIXON, Whose True Names are ARMAND M. d'ALERIA, and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Order Allowing Writ of Error and Fixing Amount of Cost and Supersedeas Bond.

On motion of H. B. M. Miller, one of the attorneys for the defendant Kate I. d'Aleria, and upon filing herein by said defendant of her petition for a writ of error and a notice by her given to her codefendant A. M. d'Aleria of her intention to petition for said writ and demanding that he either join with her in said petition or refuse so to do, to which notice is added a refusal of said defendant A. M. d'Aleria to join with her in said petition, and also an assignment of errors.

It is ordered that the said defendant Kate I. d'Aleria be, and she hereby is, allowed to prosecute

said petition in her own name alone without joining with her her codefendant A. M. d'Aleria, and that said Writ of Error be, and the same hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment made and entered herein in favor of the plaintiffs above named and against the defendants on the 21st day of December, 1921, in so far as said judgment is against her, the said defendant Kate I. d'Aleria.

And it is further ordered that upon the filing in said [65] cause with the Clerk of this Court of a good and sufficient bond in the sum of Fifteen Thousand Dollars, with good and sufficient security to be approved by this Court that she, the said defendant Kate I. d'Aleria, will prosecute her writ of error to effect and answer all damages and costs and pay the amount of the judgment, including just damages for delay, together with costs and interest on the appeal if she, the said defendant, fails to make her plea good, all further proceedings in this court be hereby suspended until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, this 16th day of March, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [66]

In the United States District Court, Northern Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also Known as Mrs. GEORGE NIXON, Whose True Names are ARMAND M. d'ALERIA, and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Order Authorizing Withdrawal of Exhibits to be Sent by Clerk to United States Circuit Court of Appeals.

It appearing to the Court that a writ of error has been taken out in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, and that the exhibits introduced at the trial of said cause are necessary for the hearing upon said writ of error,—

It is ORDERED that the Clerk of the above-entitled court transmit all the exhibits introduced in evidence on the trial of the above-entitled cause to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, this 10th day of July, 1922.

(Sgd.) M. T. DOOLING,
Judge.

[Endorsed]: Filed Jul. 10, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

(Title of Court and Cause.)

Cost and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That I, Kate I. d'Aleria, one of the defendants above named, as principal, and Maryland Casualty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and having its principal place of business at Baltimore, Maryland, as surety, are held and firmly bound unto the plaintiffs in the above-entitled action in the sum of Fifteen Thousand and No/100 Dollars ($15,000), for which payment well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of March 1922.

The condition of the above obligation is such, that whereas the above-named Kate I. d'Aleria has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit, to review and reverse the judgment made and entered in the above-entitled action in favor of the plaintiffs therein and against the defendants for the sum of Twelve Thousand and No/100 Dollars

($12,000), together with interest and costs, in so far as she is concerned.

NOW, THEREFORE, if the above-bounden defendant, Kate I. d'Aleria, shall prosecute such writ of error to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain and be in full force and effect.

KATE I. d'ALERIA.

[Seal] MARYLAND CASUALTY COMPANY,

By GEO. W. BLISS,

Attorney in Fact. [68]

State of California,
County of Los Angeles,—ss.

On this 30th day of March, in the year one thousand nine hundred and twenty-two, before me, Isabelle Perry, a notary public, personally appeared Geo. W. Bliss, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the Maryland Casualty Company, and acknowledged to me that he subscribed the name of Maryland Casualty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

[Seal] ISABELLE PERRY,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Jan. 28, 1926.

[Endorsed]: Filed Apr. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Will you please prepare at once transcript of the record in the above-entitled cause on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and forward the same to the Clerk of that court as soon as completed, including in said transcript the following papers necessary for the determination of the questions to be passed upon by said Circuit Court of Appeals, together with all endorsements thereon, namely:

1. Amended complaint;
2. Answer to amended complaint;
3. Supplemental complaint;
4. Judgment;
5. Stipulation of parties authorizing the Judge of the trial court to attend to all matters outside of this district, with the same force and effect as if attended to in this district; and order on same.
6. Bill of exceptions with stipulation as to its correctness, and order settling said Bill attached;
7. Assignment of errors;
8. Petition for writ of error;
9. Order allowing writ of error and fixing cost and supersedeas Bond;
10. Cost and supersedeas bond;
11. Original writ of error;

12. Copy of writ of error;
13. Original citation;
14. Copy of citation;
15. This praecipe;
16. Notice, and refusal of codeft. to join in application for writ of error;
17. All exhibits and order allowing withdrawal;
18. Opinion denying new trial; [70]
19. Order for judgment;
20. Verdict.

Dated, this 7th day of July, 1922.

MILLER, THORNTON and MILLER,
W. I. GILBERT,
Attorneys for Defendant Mrs. Kate Nixon.

[Endorsed]: Filed Jul. 8, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing seventy-one (71) pages, numbered from 1 to 71, inclusive, to be full, true and corect copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $30.35; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 19th day of July, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [72]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Harold A. Adrian and Kate Nixon, also known as Mrs. George Nixon, whose true names are Armand M. d'Aleria and Kate I. d'Aleria, husband and wife, plaintiffs in error, and Charles Shirey and Jennie Shirey, defendants in error, a manifest error hath happened, to the great damage of the said Kate I. d'Aleria, plaintiff in error, as by her complaint appears:

We, being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 16th day of March, in the year of our Lord one thousand, nine hundred and twenty-two.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

FRANK H. RUDKIN,
U. S. District Judge for the Eastern District of Washington. [73]

Received a copy of the within writ of error this 17th day of March, 1922.

W. C. CAVITT,
Attorney for Defendants in Error.

(Return to Writ of Error.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court for the Northern District of California.

[Endorsed]: No. 16,252. United States District Court for the Northern District of California, Second Division. Harold A. Adrian et al., Plaintiffs in Error, vs. Charles Shirey et al., Defendants in Error. Writ of Error. Filed Mar. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the United States District Court, Northern Division of California, Second Division.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also Known as Mrs. GEORGE NIXON, Whose True Names are ARMOND M. d'ALERIA, and KATE I. d'ALERIA, Husband and Wife,

Defendants.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.
To Charles Shirey and Jennie Shirey, His Wife, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of eror filed in the Clerk's Office of the District Court of the United States for the Northern District of California, wherein Kate I. d'Aleria is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error Kate I. d'Aleria as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, this 16th day of March, 1922.

FRANK H. RUDKIN,
United States District Judge. [74]

Received a copy of the within instrument this 17th day of March, 1922, citation on writ of error.

W. C. CAVITT.
Attorney for Plaintiffs.

[Endorsed]: No. 16,252. In the United States District Court, Northern Division of California, Second Division. Charles Shirey and Jennie Shirey, his wife, Plaintiffs, vs. Harold A. Adrian and Kate Nixon, Also Known as Mrs. George Nixon, Whose True Names are Armand M. d'Aleria and Kate I. d'Aleria, Husband and Wife, Defendants. Citation on Writ of Error. Filed Mar. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3895. United States Circuit Court of Appeals for the Ninth Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 19, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals, Ninth Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Defendants in Error.

Stipulation and Order Extending Time to File Record and Docket Cause—Dated April 13, 1922.

The bill of exceptions in the above-entitled cause not yet having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto that the plaintiff in error may have, and the Judge of the above-entitled court is respectfully requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used on the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 13th day of April, 1922.

W. I. GILBERT and
MILLER, THORNTON and MILLER,
Attorneys for Plaintiff in Error.
W. C. CAVITT,
Attorney for Defendants in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation, it is ordered that

the plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof within which to prepare, serve and file the transcript in said stipulation referred to.

Dated, this 15th day of April, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and order Extending Time to File Transcript. Filed Apr. 15, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Judicial Circuit.

KATE I. d'ALERIA,
Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His Wife,
Defendants in Error.

Stipulation and Order Extending Time to File Record and Docket Cause—Dated May 8, 1922.

The bill of exceptions in the above-entitled cause not yet having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto

that the plaintiff in error may have, and the Judge of the above-entitled court is respectfully requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used on the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 8th day of May, 1922.

W. C. CAVITT, per
F. J. CASTELHUN,
Attorney for Defendants in Error.
W. I. GILBERT and
MILLER, THORNTON and MILLER,
Attorneys for Plaintiff in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation. it is ordered that the plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof, within which to prepare, serve and file the transcript in said stipulation referred to.

Dated, this 10th day of May, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and Order Extending Time to File Transcript. Filed May 10, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Defendants in Error.

Stipulation and Order Extending Time to File Record and Docket Cause—Dated June 7, 1922.

The bill of exceptions in the above-entitled cause not having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto that the plaintiff in error may have, and the Judge of the above-entitled court is respectfully requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used in the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 7th day of June, 1922.

W. I. GILBERT,
MILLER, THORNTON and MILLER,
Attorneys for Plaintiff in Error.
W. C. CAVITT,
Attorney for Defendants in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation, it is ordered that the

plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof within which to prepare, serve and file the transcript and stipulation referred to.

Dated, this 7th day of June, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and Order Extending Time to File Transcript. Filed Jun. 7, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His Wife,

Defendants in Error.

Stipulation and Order Extending Time to File Record and Docket Cause—Dated July 5, 1922.

The bill of exceptions in the above-entitled cause not yet having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto that the plaintiff in error may have, and the Judge

of the above-entitled court is respectively requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used in the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 5th day of July, 1922.

MILLER, THORNTON and MILLER,
W. I. GILBERT,
Attorneys for Plaintiff in Error.
W. C. CAVITT,
Attorney for Defendants in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation, it is ordered that the plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof within which to prepare, serve and file the transcript in said stipulation referred to.

Dated, this 5th day of July, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and Order Extending Time to File Transcript. Filed Jul. 5, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922, F. D. Monckton, Clerk.